In Supreme Court of the Hawaiian Islands. In Banco. January Term, 1890.

MARY C. BECKLEY vs. GEORGE LUCAS, EXECUTOR OF THE WILL OF MARGARET KEEGAN, ET ALS.

Appeal from ruling of Dole, J.

JUDD, C. J., M'CULLY, BICKERTON AND DOLE, J. J. PRESTON J, HAVING BEEN THE ATTORNEY DID NOT SIT.

Articles of adoption were executed by A. the father, B. the adopting mother and C. the adopted child, containing a separate covenant between B. who promised to convey or devise certain real estate to C. and C. who promised to obey the lawful commands of B.

Demurrer that the consideration in the second covenant was invalid because the promise to obey was only the promise to perform a lawful duty, *was overruled* on the ground that this was a concurrent part of the contract, C. not then having been adopted, and furthermore that the promise of B. to C. is supported by the covenant of A. to B. for the adopting

Opinion of the Court, per McCully, J.

The plaintiffs bring a bill in equity for the specific performance by the defendant's decedent of a covenant contained in a certain instrument to the following effect.

There are three parties, George Risely of the first part, Margaret Keegan, widow, of the second part and Mary Risely minor daughter of the said George Risely of the third part. There is first a covenant between the party of the first part and the party of the second part wherein the said George Risely surrenders to Mrs. Keegan his parental control and rights over his child Mary, Mrs. Keegan reciprocally covenanting to adopt, maintain and care for her as if she were her own natural daughter. There is next a separate covenant between the second and third parties. The second party covenants to make a valid conveyance to the third party of a described piece of real estate, or to devise it to her by her last will and testament, and the party of the third part reciprocally covenants with the second party henceforth to obey her commands and to perform the duty of a child as towards a natural mother.

Mrs. Keegan having failed to make a conveyance of the property, or to devise it to Mary Risely in her will, the bill is brought against the executor and trustee of her will to compel specific performance.

The demurrer is "on the ground that it does not appear by said bill that there was or is any valuable consideration for the conveyance here sought nor any valid covenant for such conveyance which could have been enforced against the said Margaret Keegan in her life time nor against this defendant since her decease."

It may be said at once that there is no covenant for such conveyance which could have been enforced against the decedent in her life time unless she had otherwise conveyed away these premises or by another marriage had given a husband some rights therein, or in some other way was putting it out of her power to make the conveyance or devise she had contracted to make, for she had the option of only giving the agreed benefit after her death.

It is claimed by the demurrer that the expressed consideration for the conveyance or devise to be made, the promise of the adopted child to obey, is naked and invalid as being a promise to do what she was already bound by law to do.

By the statutes of this Kingdom, found at page 210 Compiled Laws, a child adopted as by law allowed is bound to obey the lawful and moral commands of the parents by adoption.

Adoption is however a relation artificially created and has in it some points not perfectly corresponding with the natural relation. We observe that in the beginning the creation of the relation is purely a voluntary one on the part of the parents who give and the parents who take and adopt the child.

Special terms may be made in the contract of adoption, and frequently are, particularly with regard to the pecuniary interest of the child. The child having come to years of understanding may be allowed to have some voice in the proceeding. It was so in the case before us when the subject of adoption was made a separate third party to the contract. She was treated as a person of sufficient understanding to join in a contract by the Justice of the Supreme Court by whom the adoption was ratified.

The three parties thus coming together form an agreement, the first with the second and the second with the third. The covenants are more than contemporary, they are concurrent. The promise of obedience and duty made by Mary Risely towards Mrs. Keegan is not the promise of a child adopted upon whom a duty has been cast promising to do that duty for a consideration. The covenant of Mrs. Keegan to convey or devise a valuable piece of real estate to the child cannot be separated from the motives of the transaction which was consummated in this deed whereby the father surrendered his daughter and the daughter promised filial obedience to a stranger.

There is no question but that there is a form of consideration expressed in the second covenant. We hold that it is not an unreal consideration it being made as a part of the adoption, a condition of it, and we hold that it is also supported by the first covenant it being a part of the same transaction

The demurrer is overruled.

J. M. Monsarratt, for plaintiff; C. L. Carter and F. M. Hatch, for defendants.

Honolulu, Jan. 31th, 1890.

Supreme Court of the Hawaiian Islands. In Banco. January Term 1890.

PETER KAHOOHULI vs. PAALAA HAMAUKU, WIDOW, AND EDWIN, IOKEPA AND KEONI, MINOR CHILDREN OF J. HAMAUKU, DECEASED.

BY THE COURT.

Upon consideration of the pleadings and the law in this case, we are of opinion that the demurrer should be sustained, and we therefore confirm the decision of the Chief Justice, upon the reasoning and authorities therein.

A. Rosa, for plaintiff; W. A. Kinney, for defendants.

Honolulu, Feb. 6th, 1890.

JUDD C. J., M'CULLY, BICKERTON AND DOLE, JJ.

Opinion of Chief Justice Judd, appealed from, the Jury being waived.

This is an action of Ejectment brought at the April Term 1887 to recover possession from one John Hamauku of a piece of land on King street opposite Kawaiahao Church.

The then defendant demurred to the declaration in that it did not set forth the nature and extent of the estate claimed by plaintiff. At the July Term, 1887, the plaintiff, with the leave of the Court, filed an amendment to the declaration. The case went over the January Term, 1888, it not being reached. At the Special Term, February, 1888, the parties waived a jury. On the 27th March, 1888, the defendant died and plaintiff filed, on the 8th November, 1889, a suggestion to this effect, and moved that Paalaa, widow, and Edwin, Iokepa and Keoni, minor children of said J. Hamauku, be substituted as defendants. The motion was granted and service made upon Paalaa and on W. O. Smith the Probate guardian of the minors.

By the amended declaration plaintiff claims title to the premises in dispute, in fee simple, by virtue of a clause in a deed of Hana Haalilio to John Hamauku the original defandant dated the 19th April 1869.

To this the defendants now demur that the deed referred to discloses no title in the plaintiff, or, if any title, not the title claimed by plaintiff.

The plaintiff bases his claim to the premises on the deed to the defendant's ancestor John Hamauku. This deed is made by Hana Haalilio and conveys to St. John Hamauku all the grantor's land on the Island of Oahu and particularly describes the various parcels, some five in number, in consideration of fifty dollars paid to her by said John Hamauku and describes him as her "keiki" which may mean son or nephew. He was, I believe, her nephew and she had no children of her own. Among the lands granted is "the piece of land at Kawaiahao on King street, mauka of the church, which was awarded in my name being Royal Patent No.———and the area being——— acre, more or less, excepting however that portion on the north (or right hand) portion of the house lot where the dwelling house stands, that shall be for young Hoohuli and his heirs, and if he shall die without heirs then it shall belong to St. John Hamauku and his heirs. The annual receipts and rents of the place mentioned in this paper (deed) shall belong to the one whose name is mentioned as stated in this paper (deed.) And the said place cannot be sold as long as they both live on good terms and are not opposed to each other."

The claim of the plaintiff Peter Kahoohuli is based upon the clause of the deed above recited.

I consider that this clause excepts out of the estate granted to Hamauku the lot where the dwelling house stands. It is not a technical *reservation*, for it does not create a new right in behalf of the grantor out of the estate granted and which did not exist as an independent right before the grant.

See Tiedman Real Estate, §843.

Chancellor Kent defines a reservation to be a clause in a deed whereby the grantor reserves some new thing to himself issuing out of the thing granted and not *in esse* before.

4 Kent, p. 468.

A common illustration would be the right of the grantor to take wood or water from the granted premises for a limited term.

The clause in question creates an exception, for it withdraws from the operation of the conveyance some part of the thing granted, which but for the exception would have passed to the grantee under the general description. Tiedman Real Estate, §843. 3 Washburn R. P., p. 645 (Ed. of 1876.) Here the part of the premises on King street where the dwelling house stands is excepted. It is a part of the land granted to Hamauku, and would go to him under the general description were it not for the exception. But the difficulty in this case is that it is not excepted to the grantor and her heirs and made the subject of a valid, independent grant by her to the plaintiff Kahoohuli. If it were so, the plaintiff's title would be good. But it is an exception to a stranger to the deed and without consideration moving from him.

By the authorities Hoohuli would take nothing.

In Corning vs. Troy Iron and Nail Factory, 40 N.Y., 209, Stephen Van Rensselaer conveyed a farm without reservation or exception to Jeremiah Lansing. Lansing conveyed the same premises to David Defreest "excepting and always reserving one acre of land on the south side of the creek, etc., unto Stephen Van Rensselaer, his heirs and assigns forever." The Court held that the exception in the deed prevented this one acre from vesting in Defreest, but that it was wholly inoperative to vest in Van Rensselaer any title.

In West Point Iron Co. vs. Reymert, 45 N.Y., 707, the Court held that "a reservation in a deed will not give title to a stranger, but it may operate, when so intended by the parties, as an exception from the thing granted and as notice to the grantee of adverse claims as to the thing excepted or *reserved*."

"A reservation in a deed saving to the public any right they may have to take seaweed from the premises confers no right upon any one having no other right." Hill vs. Lords, 48 Me., 83 Here the Court say "such a reservation in a deed confers no rights, *proprio vigore*, upon any one. It merely saves the grantor, upon his covenant against incumbrances, from any liability, if such rights have been previously granted or acquired."

See also Richardson vs. Palmer, 38, N. H., 212: Ives vs. Van Auken, 34 Barb., 566.

In Hornbeck vs. Westbrook, 9 Johns., 72, a deed contained a proviso that the inhabitants of Rochester should be allowed to cut and carry away wood from any part of the land conveyed, etc. The Court held the proviso to be null and void. "If the inhabitants were incompetent to take an estate at law, by that name, a reservation to them in a deed in fee to a third person would be equally void. But such a covenant or reservation to *any* third person would be void. A person who is not a party to a deed cannot take anything by it, unless it be by way of remainder. The grantor cannot covenant with a stranger to the deed."

See Moore vs. Earl of Plymouth, 3 B. and A., 71.

I am of the opinion that Peter Kahoohuli, plaintiff, takes nothing by the exception in the deed and that the demurrer must be sustained.

This view is strengthened by the clause at the end of the deed of the grantor Hana Haalilio, wherein her husband, W. H. Kahoohuli, in consideration of the sum of twenty dollars paid to him by St. John Hamauku, assents and conveys all his right in the property of his wife to St. John Hamauku his heirs and assigns as stated in this deed.

No assent by the husband to the exception (calling it a conveyance to the plaintiff) can be shown, and without it, the married woman's conveyance of her land would be void.

Demurrer sustained.